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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MANHATTAN RIVER GROUP, LLC,	:	Case No.: 18-14125 (SHL)
Debtor.	:	

CITY OF NEW YORK'S (I) OBJECTION TO DEBTOR'S MOTION FOR ORDER EXTENDING DEBTOR'S TIME TO ASSUME OR REJECT CERTAIN LICENSES, AND (II) CROSS MOTION FOR ORDER (A) LIFTING AUTOMATIC STAY TO PERMIT TERMINATION OF LICENSES UNDER 11 U.S.C. § 362(d)(1) AND (B) IN THE ALTERNATIVE, DETERMINING THAT LICENSES MAY NOT BE ASSUMED OR ASSIGNED UNDER 11 U.S.C. § 365

The City of New York and its agency, the New York City Department of Parks and Recreation (the "**Parks Department**") (collectively, the **"City"**), by its counsel, ZACHARY W. CARTER, Corporation Counsel of the City of New York, hereby files: (I) this objection (the "**Objection**") to the motion (the **"Extension Motion"**) of Manhattan River Group, the above captioned Debtor and Debtor-in-Possession **(**the **"Debtor"**), seeking entry of, *inter alia*, an order purportedly pursuant to §365(d)(4) of the Bankruptcy Code [Docket No. 26], extending the Debtor's time to assume or reject two License Agreements with the City, through July 18, 2019,

the date that is 210 days after the order for relief in this case; and (II) this cross motion (the "**Cross Motion**") for an order (A) lifting the automatic stay to permit the termination of the License Agreements pursuant to Section 362(d)(1), and (B) in the alternative, determining that the License Agreements may not be assumed or assigned pursuant to Section 365. In support of its Objection and Cross Motion the City respectfully represents:

BACKGROUND

1. The facts relevant to the City's Objection and Cross Motion are set forth in the Declaration of David Cerron, Assistant Commissioner for Concessions and Internal Audit of the Parks Department, dated May 13, 2019 (the **"Cerron Decl."**) and the Declaration of Nate Grove, Chief of Waterfront and Marine Operations of the Parks Department, also dated May 13, 2019 (the **"Grove Decl."**), which are being filed in support of the City's Objection and Cross Motion. A summary of the relevant facts is set forth below, to provide a context for the arguments to follow.

The Procedural Background

2. The Debtor filed the Extension Motion on April 16, 2019. The Court entered an order on the same date [Docket No. 27], setting an initial hearing on shortened notice on the Extension Motion on April 22, 2019 (the "**Initial Hearing**"), and permitting any opposition to the Extension Motion to be asserted at the Initial Hearing.

3. The Extension Motion only made reference to a single License Agreement dated June 25, 2009 for the Construction, Operation and Maintenance of a Full Service Restaurant and Lounge at the Dyckman Marina (the "**Restaurant License**"), a copy of which was attached to the Extension Motion as Exhibit A. At the Initial Hearing on the Extension Motion, however, the Debtor asserted that it had inadvertently omitted from the motion a request for similar relief respecting a second, separate license between the Debtor and the City for the operation of a marina

(the "**Marina License**"). A copy of the Marina License is attached to the Cerron Declaration as Exhibit A.

4. The City appeared by counsel at the Initial Hearing on the Extension Motion, and raised certain objections. In addition, the City reserved all of its rights regarding whether the Restaurant License and the Marina License were subject to Bankruptcy Code Section 365(d)(4) or any other provision of Section 365, as the Debtor had asserted in the Extension Motion.

5. The Court determined to hold a further hearing on the Extension Motion and related matters on May 6, 2019 (the "**May 6 Hearing**"). In addition, the Court directed the Debtor to inform the City by May 1, 2019, whether it would agree to an immediate rejection of the Marina License. The Court extended the Debtor's time to assume or reject the Restaurant License and the Marina License until the May 6 Hearing.

6. The Debtor and the City thereafter had several conversations and communications in an attempt to negotiate a settlement, which they agreed would be subject to appropriate confidentiality protections, including those of Federal Rule of Evidence 408.

7. At the Debtor's request, the City agreed that it had no objection to the Debtor's informing the City of its decision with respect to the Marina License on May 2, 2019. The parties were not able to reach a settlement, and on May 2, 2019, the Debtor filed a letter on the Court's docket (the "**May 2 Letter**"), a copy of which was sent to the City's counsel, informing the City and the Court of the Debtor's intention to assume the Marina License "at confirmation."

8. At the May 6 Hearing, the Debtor requested that the Court extend its time to assume or reject the Restaurant License and the Marina License until the confirmation of its projected plan of reorganization. The City objected, and, argued that, at least as to the Marina License, the

Court should no longer extend the time to assume or reject. The Court determined to hold a further hearing on the Extension Motion on May 14, 2019 (the "**May l4 Hearing**"), and extended the time for both licenses to that date. The Court also indicated that it would permit the City to present a request for relief on shortened notice in connection with the May 14 Hearing. The City, accordingly, is filing this Objection and Cross Motion to request such relief.

9. On May 9, 2019, the Debtor filed two separate motions, one for authority to enter into a management agreement with an entity known as 348 Hudson River Partners LLC (the "**Manager**") [Docket No. 34] (the "**Management Motion**") and another for authority to obtain a loan of $150,000 from an entity known as Waterfront Hospitality Partners LLC (the "**Lender**") [Docket No. 37] (the "**Loan Motion**"). The Court entered orders setting preliminary hearings on these motions at the May 14 Hearing. The City has separately filed its preliminary objections to these motions, and reserved its rights to further object in connection with any additional or final hearings respecting them.

DISCUSSION

Introduction

10. The Debtor now has made clear that its real interest (and that of its potential new investors and/or plan funders) is in trying to salvage the restaurant operation. The Debtor has no real interest in running a first class, full service marina, as is required in the Marina License. See, Debtor's May 2 Letter, p. 2; Management Motion, ¶¶ 9, 13. It only resists rejecting the Marina License at this time because it wants to continue to utilize a portion of the marina property (the Quonset hut) for the operation of the restaurant. In the meantime, the Debtor has defaulted on its obligations under both the Restaurant License and the Marina License. This has caused – and

continues to cause -- substantial harm to the City and to the public interest. See Cerron Decl., ¶¶ 14-18; Grove Decl., at ¶¶ 11-27, 30-39. The Court should not permit this to continue.

11. The Debtor has asserted that it intends to try to assume both the Restaurant License and the Marina License in connection with the confirmation of a plan of reorganization (which it has not yet proposed or filed). Thus, the usual, primary grounds for granting an extension of the time to assume or reject – that the debtor needs additional time to make up its mind -- is not relevant here. Accordingly, the City requests that this Court now turn to the merits of whether the Debtor may legally assume either the Restaurant License or the Marina License, and whether it should be afforded further protection of the automatic stay. The City submits that it should not.

The Agreements at Issue Are Both Licenses for the Use of Real Property and "Cause" Exists Under Section 362(b)(1) to Lift the Automatic Stay to Permit Termination

12. In the Extension Motion, the Debtor asserted that it is a party to "the Licenses which constitutes an unexpired executory contract for non-residential real property within the meaning of Section 365(d)(4) of the Bankruptcy Code." Extension Motion, ¶ 8. As noted above, the City objected and reserved all of its rights regarding whether the Restaurant License and the Marina License were subject to Bankruptcy Code Section 365(d)(4) or any other provision of Section 365.

13. Presumably, the Debtor takes the position that it may assume the Licenses pursuant to Section 365. However, in cases that were remarkably similar to this one, Bankruptcy Courts have had no trouble determining that a debtor with a mere license in real property under New York Law was not entitled to assume such license. For example, *In re Yachthaven Rest., Inc.*, 103 B.R. 68 (Bankr. E.D.N.Y. 1989), involved the World's Fair Marina in Queens. The primary

license was with a third party and the debtor had a sublicense to operate a restaurant and marina. Bankruptcy Judge Duberstein noted that the "debtor's principal argument is that the license and sublicense agreements are executory contracts and therefore the licensee is afforded the same rights to assume and assign the license agreement as if it were a lease pursuant to § 365 of the Bankruptcy Code. This argument is flawed by the very definition of a license." 103 B.R. at 72 (Emphasis supplied). Judge Duberstein further explained:

> With respect to real property, a license has been defined as an authority to enter upon the lands of another to do a particular act or series of acts without possessing any interest in the lands. 3 Warren's Weed on the New York Law of Real Property, License § 102 (1989). Furthermore, it is personal to the licensee, is not assignable by him and is revocable by the licensor. 49 N.Y. Jur. 2d Licenses in Real Property § 195 (1985). It creates no burden running with the land. It is the lowest order or privilege touching or affecting real property. *Lombardi v. Lombardi*, 63 A.D.2d 1111, 406 N.Y.S.2d 396 (1978). It flows with the person to whom it attaches, indivisible and inseparable from him and able to be immediately withdrawn or extinguished at the will of the licensor. *Schnipper v. Flowood Realty Corp*., 113 N.Y.S.2d 842 (1952 New York Mun. Ct.), rev'd on other grounds, 122 N.Y.S. 2d 178 (App Term).

In re Yachthaven Rest., Inc., 103 BR 68, 72-73 (Bankr. E.D.N.Y. 1989).[1]

14. Judge Duberstein then determined that the agreement at issue was indeed a license for the use of real property. He noted that the underlying document referred to the non-City party as the licensee. In addition, the agreement contained a provision entitled "NO LEASE", and which stated: "It is expressly understood and agreed that no land is leased to licensee." Judge Duberstein also found significant that the City is precluded by law from alienating park land in

[1] See also, *In re Middle Bay Golfers' Assn.*, 2013 Bankr LEXIS 5108, at *36 (Bankr. E.D.N.Y. Dec. 5, 2013, No. 8-13-70361-dte) (Under New York law, a license gives one party the authority to enter the land of another to do a particular act or series of acts without possessing any interest in the land, and a licensee occupies the land so far as is necessary to do the act with no further right of possession, citing *In re Yachthaven Restaurant, Inc.*, supra.)

the absence of a grant from the state legislature, citing *Miller v. City of New York*, 15 N.Y.2d 34, 203 N.E.2d 478, 255 N.Y.S.2d 78 (1964). He concluded:

> Therefore, the City could not legally have intended to enter into anything other than a license agreement. The intent of the parties could not have been manifested more clearly by the actual written agreement and therefore the law with respect to licenses will apply to the issues in this proceeding.

In re Yachthaven Rest., Inc., 103 B.R. at 73 (Emphasis supplied).

15. Applying the law respecting licenses, Judge Duberstein found that the parties had contracted that the Commissioner of Parks was entitled to terminate the license on appropriate notice, provided that he was acting in good faith. He further found that it was clear that the City had ample grounds for termination because of the substantial defects which existed on the premises at the time of the Notice of Termination. 103 B.R. at 74.

16. Similarly, *In re M.J. & K. Co.*, 161 B.R. 586 (Bankr. S.D.N.Y. 1993), involved a debtor who had an agreement to run a bookstore at Brooklyn Law School. Bankruptcy Judge Garrity applied an analysis similar to that of Judge Duberstein to determine that the debtor had a mere license to use real property under New York law.[2] Applying that analysis, Judge Garrity

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[2] On this point Judge Garrity wrote:

> A license in real property is a contract which permits a party "to render services within an enterprise conducted on premises or operated by another, who has supervisory power over the method of rendition of the services . . . " *Lordi v. County of Nassau*, 246 N.Y.D.2d 502, 504 (2d Dept.), *aff'd*, 14 N.Y.2d 699, 250 N.Y.S.2d 54, 199 N.E.2d 155 (1964) *(per curiam); see also In re Yachthaven Restaurant, Inc.*, 103 Bankr. 68, 72 (Bankr. E.D.N.Y. 1989) (license in real property authorizes licensee "to enter upon the land of another to do a particular act or series of acts without possessing any interest in the lands") (citing 3 Warren's Weed on New York Law of Real Property License § 102 (1989)); David P. Van Knapp, 61 *N.Y. Jur. 2d* Statute of Frauds, § 123 at [**12] 196 (1987) ("[a] license with respect to real property is a privilege to do one or more acts on land, without having an interest [in the land] therein.") The license is personal to the license, *see Simmons v Abbondandolo*, 184 A.D.2d 878, 585 N.Y.S.2d 535 (3d Dept. 1992), and is created for a limited purpose. *See Harmatz v. Glickman*, 13 Misc. 2d 271, 176 N.Y.S.2d 454, 454 (Sup. Ct. Kings Co. 1958); *see*

construed the agreement as a license in real property. First, it was labelled a license to operate a bookstore, and it included a provision that the agreement "shall not create any relationship of landlord and tenant between the Law School and [the debtor], but the sole relationship shall be that of a licensor and licensee." Second, it contained an express restriction that the debtor had a right to use the space as a bookstore "and for no other purpose," citing, *Lordi v. County of Nassau*, 20 A.D.2d 658, 246 N.Y.S.2d 502, *aff'd* 14 N.Y.2d 699, 250 N.Y.S.2d 54, 199 N.E.2d 155 (limited right to operate a golf pro shop is a license in real property), and *In re Yachthaven Restaurant, Inc.*, 103 Bankr. 68 (right to operate, maintain and make improvements to marina area and to operate restaurant at marina is a license in real property.) Finally, the law school was vested with expansive supervisory controls over the conduct of the debtor's business, including restrictions on the debtor's right to advertise outside the store without prior approval by the licensor, mandatory hours of operation, and mandatory pricing requirements. *In re M.J. & K. Co.*, 161 B.R. at 592-593, citing numerous New York cases.[3]

> *also* 49 *N.Y. Jur. 2d* Easements and Licenses in Real Property § 199 at 330 (1987) ("[a] license to do an act on land involves the occupation of the land by the licensee so far as is necessary to do the act and no further").

In re M.J. & K. Co., 161 B.R. 586, 591 (Bankr. S.D.N.Y. 1993).

[3] Judge Garrity cited the following cases on this point:

> See, e.g., *Lordi v. County of Nassau*, 246 N.Y.S. 2d at 505 (terms of agreement specified portion of premises licensee could occupy and licensor had supervisory control over method in which licensee rendered service); *Layton v. A.I. Namm & Sons, Inc*., 275 A.D. 246, 89 N.Y.S.2d 72 (1st Dept.), aff'd, 302 N.Y. 720, 98 N.E.2d 590 (1951). (agreement limited space within store where optician could conduct his business and permitted licensor to alter that space*); Kaypar Corporation v. Fosterport Realty Corporation*, 1 Misc. 2d 469, 69 N.Y.S.2d 313 (Sup. Ct. Sp. Term Bronx Co.), aff'd, 272 A.D. 878, 72 N.Y.S.2d 405 (1st Dept. 1947) (agreement allotted limited space to licensee for installation of coin operated washing machines and did not provide for exclusive possession of that space); *Planetary Recreations, Inc. v. Kerns, Inc*., 184 Misc. 340, 54 N.Y.S.2d 418 (N.Y. Cty Ct. 1945) (agreement limited where licensee could operate coat check service and did not allow for exclusive possession by licensee).

In re M.J. & K. Co., 161 B.R. 586, 592-593 (Bankr. S.D.N.Y. 1993).

17. Judge Garrity noted that any right created in the debtor's estate by the license was protected by the automatic stay. However, the nature and extent of those rights, if any, are fixed by state law, citing *Butner v. U.S.,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The filing of a petition under the Bankruptcy Code does not expand those rights; whatever rights a debtor has in property at the commencement of the case continue in bankruptcy -- no more, no less. *In re M.J. & K. Co.*, 161 B.R. at 593 (Citations omitted). In the circumstances, Judge Garrity held that the licensor in that case had the right to terminate the license, as long as it acted in good faith.

18. Judge Garrity noted that pursuant to Section 362 (d)(1), a party in interest is entitled to relief from the automatic stay if it can show "cause", which is defined to include "the lack of adequate protections of an interest in property of such party in interest." *See* 11 U.S.C. § 362 (d)(1). When deciding whether to modify the automatic stay, "the court must consider the particular circumstances of the case and ascertain what is just to the claimants, the debtor, and the estate." *In re M.J. & K. Co.*, 161 B.R. at 590, citing *In re Mego Int'l Inc.*, 28 Bankr. 324, 326 (Bankr. S.D.N.Y. 1983).; Bankr. S.D.N.Y. 1993). The standard for relief is broad and flexible, and must be addressed on a case by case basis. Id. at 590-591.

19. In that case, it was clear that the Debtor could not perform its obligations under the license because it did not have sufficient inventory, and lacked the funds or credit needed to purchase the texts needed by the students. Under these circumstances, Judge Garrity held that cause existed to lift the automatic stay to permit termination of the license:

> [The licensor's] good faith in this matter is manifest. Termination of its relationship with Debtor will promote the law school's policy of engaging in short term service contracts and eliminate the uncertainties presently existing regarding whether Debtor will be able to obtain the text books needed in the Spring semester. Under these facts, and as a licensor at will, it cannot be required

> to continue its business relationship with Debtor. Accordingly, it is entitled to relief from the automatic stay to serve the Proposed Notice and take appropriate steps to recover possession of the Premises. *See In re Chautauqua Capital Corp.*, 135 Bankr. 779, 782 (Bankr. W.D.Pa. 1992).

In re M.J. & K. Co., 161 B.R. at 595 (Emphasis supplied).

20. These Bankruptcy Court cases are in line with New York cases regarding licenses in real property, particularly those involving park land. For example, New York courts have consistently held that licensees do not obtain an interest in the land. Rather, a licensee obtains a "revocable privilege" to use another's land temporarily for a specified fee. See *Union Square Park Community Coalition, Inc. v. New York City Dept. of Parks & Recreation*, 22 N.Y.3d 648 (2014); *Ark Bryant Park Corp. v. Bryant Park Restoration Corp*, 285 A.D.2d 143 (1st Dep't 2001). In *Union Square*, the court approved an agreement between the Parks Department and a private corporation permitting the corporation to operate a seasonal restaurant in the Union Square Park pavilion. The agreement was for a 15 year term with an annual "license fee" of $300,000.00 in the first year, increasing to about $450,000.00 in the final year, or 10% of the annual gross receipts, whichever amount was greater. The agreement also obligated the corporation to make capital improvements totaling $700,000.00. In holding that the agreement constituted a license, and not a lease, the court relied upon the following factors: (1) the Department retained significant control over the daily operations of the restaurant including the months and hours of operation, staffing plan, work schedules and menu prices, (2) use of the premises would only be seasonal and not exclusive as the restaurant was required to make outdoor seating available to the public during the summer months, and most importantly, (3) the agreement broadly allowed the Department to terminate the license at will, as long as the termination was not arbitrary and capricious. *Id.* at 657.

21. In *Ark Bryant Park Corp. v. Bryant Park Restoration Corp*, 285 A.D.2d 143 (1st Dep't 2001), the City revoked the license of Bryant Park Restoration Corp. to enter into agreements for food and beverage catering for special events in Bryant Park, effectively terminating plaintiff's catering sublicense. The Court found that the license did not grant any party an interest in the property and that the City could revoke the license (and sublicense) at will ("A license, within the context of real property law, grants the licensee a revocable non-assignable privilege to do one or more acts upon the land of the licensor, without granting possession of any interest therein").

22. It is worth noting that in New York, because a licensee does not have an interest in real property, courts will not issue an injunction to protect a licensee's purported interest. *See D'Aversa v. Guido*, 213 A.D. 355, 356-57 (2d Dep't 1925) ("The agreement in question -- a mere license revocable at will -- created no right in the defendant's property which a court of equity would protect by injunction, and the plaintiff never having had any ground upon which to invoke equitable jurisdiction, the court had no authority to try another and purely legal cause of action"); *Quik Park W. 57 LLC v. Bridgewater Operating Corp.*, 2015 NY Slip Op 30948(U) at *13 (Sup. Ct. N.Y. County June 2, 2015) (Bransten, J.) (holding that a licensee had no interest in the property itself "which a court of equity will protect by injunction"). Moreover, licensees, as parties without an interest in the real property, may be removed from City property without legal process. *See P&A Bros., Inc. v. New York Dep't of Parks & Recreation,* 184 A.D.2d 267, 269 (1st Dep't 1992). Accordingly, if it were not for the protection of the automatic stay in this case, the City would have been entitled to terminate long ago the licenses and recover the property for the public benefit.

23. The City respectfully submits that, in this case, cause exists for this Court to lift the automatic stay to permit the City to terminate both the Restaurant License and the Marina License. There can be no doubt that both agreements at issue here are licenses to use real property. Both agreements are entitled "License Agreement" and each refers to the Debtor throughout as the "Licensee." Furthermore, each agreement contains an identical provision, at Section 1.3, which states: "It is expressly understood that no land, building, space, or equipment is leased to Licensee, but that during the Interim Period (as hereinafter defined) and the Term of the License, Licensee shall have the use of the Licensed Premises for the purpose herein after provided." (Emphasis supplied). Section 1.3 further contains a specific restriction on the Licensee's use of the premises: "Except as herein provided, Licensee has the right to occupy and operate the Licensed Premises only so long as each and every term and condition in this License is strictly and properly complied with and so long as this License is not terminated by Commissioner." Each agreement vests the City with expansive supervisory controls over the conduct of the debtor's business, including: approval of all rates, fees and prices to be charged for any goods or services (Section 10.1); mandatory hours of operation (Section 10.2); restrictions on the sale of tobacco products (Section 10.3); restrictions on the debtor's advertising and promotion programs and its signage (Sections 10.15 and 10.16); and restrictions on outside amplified music (Section 10.18).[4] See *In re M.J. & K. Co.*, 161 B.R. at 592-593, and the numerous cases cited therein.

[4] In addition, the Restaurant License contains numerous additional provisions vesting the City with supervisory control over other special aspects of the operation of a restaurant, including: placement of vending machines (Sections 10.21); sale of alcoholic beverages (Section 10.23); storage of flammable substances (Section 10.24); scheduling of special events (Section 10.25); and the location, design and number of tables (Section 10.27). Likewise, the Marina License contains additional provisions vesting the City with supervisory control of operations of the marina, including: repair

24. In addition, as in the *Yachthaven* case discussed above, the City is precluded by law from alienating park land in the absence of a grant from the state legislature. See, e.g., *Miller v. City of New York*, 15 N.Y.2d 34, 203 N.E.2d 478, 255 N.Y.S.2d 78 (1964). See also, Cerron Decl., ¶4. Accordingly, in this case, as in the *Yachthaven* case, the City could not legally have intended to enter into anything other than a license agreement; the intent of the parties could not have been manifested more clearly by the actual written agreement; and therefore the law with respect to licenses should be applied to the issues in this proceeding. See *In re Yachthaven Rest., Inc.*, 103 B.R. at 73.

25. Thus, applying the law with respect to licenses, it is clear that the City has the right to terminate each of the licenses, as long as it does not act in bad faith. See, e.g., *In re M.J. & K. Co.*, 161 B.R. at 595. See also, Section 3.2 of the Licenses which provides: "Notwithstanding any language contained herein, this License is terminable at will by the Commissioner in his sole and absolute discretion, at any time, however, such termination not be arbitrary and capricious. Such termination shall be effective after twenty-five (25) days written notice is sent to Licensee."[5] In this case, the Debtor has defaulted numerous times on its obligations under each of the licenses. In the case of the Marina License, these defaults are especially egregious and call out for immediate redress. See Cerron Decl., ¶¶ 14-18; Grove Decl., at ¶¶ 11-27, 30-39. These defaults have harmed the City and the public interest. The failure to promptly open the Marina

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of the boat pump-out station (Section 10.23); providing for safe navigation and removal of sunken boats (Section 10.27); prohibition of rental or sale of jet skis (Section 10.28); repair of decks (Section 10.32); requirement that all vessels on land or in water be in good operational condition (Section 10.33); restriction on use of marina or boat as a permanent residence (Section 10.34); use of the Quonset Hut only for marina operations (Section 10.36); plans for number and organization of moorings (Section 10.39); use by the general public of area to launch small boats free of charge (Section 10.40).

[5] See also, Section 3.3, regarding termination for cause; and Sections 3.4 through 3.10 for the consequences of termination and provision for vacation of the property.

for the current season would be particularly harmful to the public, particularly since the nearest marina to the Dyckman marina in Manhattan is the 79th Street Boat Basin, which has an over-700 person waiting list. It presently takes over twelve years to receive a docking permit there. Grove Decl., ¶ 32. Clearly, termination of the Marina License in these circumstances would be in good faith. Accordingly, the City requests that the Court enter an order lifting the automatic stay for cause, permitting the City to terminate the Marina License immediately.

Even If Section 365 Were Applicable, the Debtor Could Not Legally Assume or Assign the Agreements at Issue

26. As discussed above, the Debtor's assertion that it should be afforded the same rights to assume and assign the license agreements as if they were leases pursuant to Section 365, is "flawed by the very definition of a license." *In re Yachthaven Rest., Inc.*, 103 B.R. 68, 72 (Bankr. E.D.N.Y. 1989). However, even assuming *arguendo* that Section 365 did apply, the Debtor would still not be able to assume or assign the agreements, for several reasons.

27. **Application of Section 365(c)(1).** It appears that the Debtor intends to try to reorganize by bringing in entirely new equity owners. The Marina License and the Restaurant License contain identical provisions, at Section 14.1, which require the written approval of the City in advance of any sale, transfer, assignment, sublicense of the License, or "a majority of the shares of or interest in Licensee. . ." Section 14.1 further provides:

> The term "assignment" shall be deemed to include any direct or indirect assignment, sublet, sale, pledge, mortgage, transfer of or change in more than 49% in stock or voting control of or interest in Licensee, including any transfer by operation of law. No sale or transfer of the stock of or interest in Licensee may be made under any circumstance if such sale will result in a change of control of Licensee violative of the intent of this Section 14, without the prior written consent of Commissioner, which shall not be unreasonably withheld.

Thus, it appears that the Debtor is contemplating a transaction which is an "assignment" within the terms of the Licenses. However, under Section 365(c), it may not engage in that transaction without the City's approval.

28. Although a debtor generally has the right to assume and assign an executory contract or unexpired lease under Section 365(a) and (f), it may not do so if the non-debtor party cannot be compelled to accept performance from an entity other than the debtor or debtor in possession under applicable law. Thus, Section 365(c)(1) expressly provides: "The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment . . . if – (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from . . . an entity other than the debtor or the debtor in possession whether or not such contract or lease prohibits or restricts assignment . . . and (B) such party does not consent to such assumption or assignment." 11 U.S.C. § 365(c)(1)(A), (B).

29. Judge Duberstein recognized the applicability of Section 365(c) to the licenses involved in the *Yachthaven* case:

> 11 U.S.C. § 365(c)(1) states that the Trustee may not assume an executory contract if applicable non-bankruptcy law prohibits it. The courts have held § 365 does not deal exclusively with the problem of personnel service contracts but includes situations where state or federal law can be said to bar assignment. *In re Pioneer Ford Sales, Inc.,* 729 F.2d 27 (1st Cir. 1984); *In re Braniff Airways, Inc.,* 700 F.2d 935 (5th Cir. 1983).
>
> Section 3 of the New York City Charter allows the Mayor to issue executive orders which have the force of law. The Mayor issued an order that states: "Rights under a concession agreement, shall not be sold, assigned or otherwise transferred without approval by the Concession Review Committee." <u>The City is responsible for screening for the benefit of the public all potential concessionaires to make sure they are honest and professional. Therefore, we are</u>

> satisfied that the requirements of § 365(c) are met and the license is not assignable.

In re Yachthaven Rest., Inc., 103 BR 68, 78-79 (Bankr. E.D.N.Y. 1989) (Emphasis supplied).

30. Similarly, here, the agreements at issues cannot be either assumed or assigned without City consent. Each of the Licenses contains a virtually identical recitation on page 4: "WHEREAS, Parks complied with the requirements of the Franchise and Concession Review Committee ('FCRC') for the selection of concessionaires, including the issuance of a Request for Proposals ('RFP') for the operation, maintenance and management of the [Licensed Premises/Dyckman Marina]." See also Cerron Decl., ¶¶ 4-6, discussing the City's compliance with the law and rules regarding the granting of concessions, including the RFP process. Accordingly, Section 365(c)(1) excuses the City from accepting the assumption or assignment of the licenses without consent in these circumstances.

31. **The Debtor Cannot Provide Adequate Assurance of Future Performance Under Section 365(b) or (f).** Where there has been a default in an agreement, the debtor's right to assume under Section 365(a) is conditioned on its obligations to cure the defaults and to "provide adequate assurance of future performance under such contract or lease." Section 365(b)(1)(B),(C). Moreover, under Section 365(f) a debtor may assign a contract or lease only if the assignee likewise gives adequate assurance of future performance by the assignee. Particularly with respect to the Marina License, neither the Debtor nor its prospective new owners, really have an interest in -- or capacity to -- operate a first class marina. See Debtor's May 2 Letter. Accordingly, here, the Debtor could not meet the requirements of either Section 365(b) or Section 365(f). See Cerron Decl., ¶¶ 14-18; Grove Decl., at ¶¶ 11-27, 30-39.

32. **The Debtor Cannot Promptly Cure Defaults Under Section 365(b)(1).** Where there has been a default, the debtor's right to assume and assign an executory contract or unexpired lease pursuant to Section 365(a), is also conditioned on its obligations to cure defaults and to compensate the non-debtor party for any actual pecuniary loss resulting from such default. Section 365(b)(1)(A), (B).

> The purpose of § 365(b)(1) is "to restore the 'debtor-creditor relationship . . . to pre-default conditions,' bringing the [loan] back into compliance with its terms." *In re U.S. Wireless Data, Inc*., 547 F.3d 484, 489 (2d Cir. 2008) (quoting *In re Taddeo*, 685 F.2d 24, 26-27 (2d Cir. 1982) and citing 3 Collier on Bankruptcy § 365.05[3], 365-54 (15th ed. rev. 2008)).

In re DBSI, Inc., 405 B.R. 698, 704 (Bankr. D. Del. 2009).

33. In this case, the Debtor has proven unable and/or unwilling to remedy the defaults under the licenses, particularly under the Marina License. See Cerron Decl., ¶¶ 14-18; Grove Decl., at ¶¶ 11-27, 30-39. The City has no information regarding the personnel or actual or potential financial resources of potential investors. In these circumstances, it is hard to imagine how the Debtor or its prospective new owners could promptly cure – or give adequate assurance that it will promptly cure -- all defaults under the Marina License and compensate the City for any actual pecuniary loss. Accordingly, the Debtor cannot meet this requirement of Section 365 either.

WHEREFORE, the City respectfully requests that the Court: (I) deny approval in all respects of the Debtor's Extension Motion; and (II) grant in all respects the City's Cross Motion for an order (A) lifting the automatic stay to permit the termination of the License Agreements pursuant to Section 362(d)(1), and (B) in the alternative, determining that the License Agreements may not be assumed or assigned pursuant to Section 365; and (III) that the Court grant to the City such other and further relief as the Court determines to be just.

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